

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TOLL BROTHERS, INC.,)	Case No. 08-987 SC
)	
Plaintiff,)	ORDER DENYING
)	PLAINTIFF AND
v.)	COUNTER-DEFENDANT'S
)	MOTION FOR JUDGMENT
CHANG SU-O LIN; HONG LIEN LIN; HONG)	<u>ON THE PLEADINGS</u>
YAO LIN,)	
)	
Defendants.)	
)	
AND RELATED COUNTER-CLAIMS.)	
)	

I. INTRODUCTION

This matter comes before the Court on Plaintiff and Counter-Defendant Toll Brothers, Inc.'s Motion for Judgment on the Pleadings ("Motion"). Docket No. 46. Defendants and Counter-Claimants Chang Su-O Lin, Hong Lien Lin, and Hong Yao Lin (the "Lins") filed an Opposition and Toll Brothers, Inc. ("Toll") submitted a Reply. Docket Nos. 54, 65. For the reasons stated herein, the Plaintiff's Motion is DENIED.

II. BACKGROUND

The following facts are taken from Defendants' Answer to Second Amended Complaint and Counter-Claim Against Counter-Defendants ("Answer"), Docket No. 40, unless otherwise noted. On May 27, 2004, Toll and the Lins entered into a written contract for the purchase and sale of approximately 147 acres of real

1 estate located in Alameda County, California. The purchase price
2 was \$241,500,000. Toll was required to make a deposit of
3 \$21,735,000. Second Amended Complaint, Docket No. 39, Exhibit A
4 ("Agreement") § 2.2. Toll was to acquire the land in three
5 stages, and the deposit was to be credited as follows: \$7,000,000
6 at the closing of Sub-Area 1; \$7,000,000 at the closing of Sub-
7 Area 2; and \$7,735,000 at the closing of Sub-Area 3. Id.
8 § 2.2(c).

9 The scheduled date of the first closing was September 30,
10 2005.¹ Id. § 5.1. Escrow closed on Sub-Area 1. The scheduled
11 date of the second closing was June 30, 2006. Id. § 5.2. In July
12 2006, Toll assigned its rights under the Agreement relating to
13 Sub-Area 2 to a third party, Regent Land Investment LLC
14 ("Regent"), and escrow closed on Sub-Area 2. The scheduled date
15 of the third closing was June 30, 2007. Id. § 5.3. The third
16 closing never occurred. At the time of the third closing,
17 \$7,735,000 of the deposit remained. Toll gave the Lins notice of
18 its termination and/or rescission of the contract on December 7,
19 2007. Toll filed the present suit seeking, among other things,
20 rescission of the Agreement, a declaration that the Agreement is
21 illegal and void, and restitution of the deposit of \$7,735,000.
22

23 **III. LEGAL STANDARD**

24 "After the pleadings are closed - but early enough not to
25

26 ¹ The Agreement contains a typographical error stating that
27 September 30, 2005, is the scheduled closing date of the second
28 closing.

1 delay trial - a party may move for judgement on the pleadings."
2 Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when
3 the moving party clearly establishes on the face of the pleadings
4 that no material issue of fact remains to be resolved and that it
5 is entitled to judgment as a matter of law." Hal Roach Studios,
6 Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir.
7 1990). Plaintiff is not entitled to judgment on the pleadings if
8 the answer raises issues of fact or an affirmative defense which,
9 if proved, would defeat plaintiff's recovery. Gen. Conference
10 Corp. of Seventh-Day Adventists v. Seventh-Day Adventist
11 Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989).

12 13 **IV. DISCUSSION**

14 Toll's Motion raises three issues. First, Toll argues that
15 the Agreement is illegal and void under California's Subdivision
16 Map Act ("SMA"), Cal. Gov. Code § 66410, et seq. Second, Toll
17 argues that the pleadings establish that Toll's assignment of Sub-
18 Area 2 to Regent did not breach the Agreement. Finally, Toll
19 argues that the Lins' intentional and negligent misrepresentation
20 counter-claims should be dismissed because a breach of contract
21 cannot be transformed into a tort. The Court addresses each issue
22 in turn.

23 **A. The SMA and the Agreement**

24 Toll argues that the Agreement violates the SMA, and that the
25 Court should therefore enter judgment in Toll's favor on the fifth
26 cause of action in the Second Amended Complaint, on Toll's fifth
27 and seventh affirmative defenses to the Lins' Counter-Claim, and
28

1 on the Lins' first, second, third, fourth, fifth, sixth, and
2 eighth counter-claims. Section 66499.30(b) of the Subdivision Map
3 Act ("SMA") provides that:

4 No person shall sell, lease or finance any
5 parcel or parcels of real property or commence
6 construction of any building for sale, lease
7 or financing thereon, except for model homes,
8 or allow occupancy thereof, for which a parcel
9 map is required by this division or local
ordinance, until the parcel map thereof in
full compliance with this division and any
local ordinance has been filed for record by
the recorder of the county in which any
portion of the subdivision is located.

10 Cal. Gov. Code § 66499.30(b). The SMA contains a limited
11 exception to this prohibition for contracts that are "expressly
12 conditioned upon the approval and filing of a final subdivision
13 map or parcel map, as required under this division." Id.
14 § 66499.30(e).

15 Toll argues that the Agreement is illegal and void because it
16 is not "expressly conditioned" upon the recording of a map since
17 it allows the recording to be waived. Mot. at 8-9. Section 5.5
18 of the Agreement outlines the Buyer's Closing Conditions. One of
19 these conditions is that "Seller shall have caused the Map (or
20 Maps) to be recorded." Agreement § 5.5(d). The Agreement states
21 that "if any Buyer's Closing Conditions remain unsatisfied as of
22 the date then established as the Closing Date, Buyer shall have
23 the right, in its sole and absolute discretion, to (1) waive one
24 or more of Buyer's Closing Conditions and proceed with the
25 Closing." Id. § 5.5(h).

26 However, in a different section of the Agreement, entitled
27 "Parcel Map to Create Legal Parcel," it states:

1 The entirety of the Property is not currently
2 subdivided in a manner that would permit its
3 conveyance in the contemplated Sub-Areas.
4 Seller shall, at its sole cost and expense,
5 cause the City to record a parcel map or other
6 map or maps (the "Map") in order to create the
7 Property as legal parcels that can be conveyed
8 consistent with the requirements of the
9 Subdivision Map Act and the City's Subdivision
10 Ordinance.

11 Id. § 3.2. This section of the Agreement is not part of the
12 section entitled "Buyer's Closing Conditions." The Agreement is
13 ambiguous as to whether the Buyer's ability to waive the Buyer's
14 Closing Conditions in Section 5.5 of the Agreement gives Toll the
15 right to waive the Lins' obligation to cause the City to record a
16 parcel map as required by Section 3.2.

17 Toll relies on Black Hills Investments, Inc. v. Albertson's,
18 Inc., 146 Cal. App. 4th 883 (2007). However, the present facts
19 are distinguishable. In Black Hills, the California Court of
20 Appeal affirmed the finding that two contracts did not comply with
21 the SMA because the seller could waive the seller's obligation to
22 obtain and record a parcel map. Id. at 893. In the present case,
23 Toll's Agreement with the Lins permits the buyer to waive the
24 condition requiring the seller to record a parcel map, which would
25 seem to further one of the purposes of the SMA; namely, its goal
26 of protecting individual real estate buyers. See id. at 889-90,
27 892.

28 Since there is an issue as to whether the Agreement gives
29 Toll the right to waive the Lins' requirement to cause the City to
30 record a parcel map, the Court denies Toll's Motion with respect
31 to the fifth cause of action in the Second Amended Complaint, the

1 fifth and seventh affirmative defenses to the Lins' Counter-Claim,
2 and the Lins' first, second, third, fourth, fifth, sixth and
3 eighth counter-claims.

4 **B. Toll's Assignment of Sub-Area 2 to Regent**

5 Toll seeks judgment on the pleadings that its assignment of
6 Sub-Area 2 to Regent did not breach the Agreement. The Agreement
7 provides that:

8 Neither Buyer nor Seller shall assign all or
9 any portion of its interest in this Agreement
10 without the prior written consent of the other
11 (which consent shall not be unreasonably
12 withheld); provided, however, that (so long as
13 Buyer and Seller remain liable for the
14 performance of it's [sic] obligations under
15 the terms of this agreement) either Buyer or
16 Seller shall have the right to assign this
17 Agreement in whole or in part without the
18 other's consent to : (i) any affiliate of
19 Buyer or Seller; (ii) any entity in which
20 Buyer or Seller or such affiliate hold as
21 least a 50% interest; or (iii) as to Buyer, to
22 any entity that serves as a 'land banker' for
23 Buyer, and any such assignee shall have the
24 same right to assign with respect to its
25 interest in this Agreement.

26 Agreement § 18.7.

27 Toll argues that the Lins' Counter-Claim shows that the Lins
28 consented to the assignment to Regent. Mot. at 11. The Lins
allege that Toll assured them that Toll would continue to develop
the property despite the assignment to Regent as a "land banker."²
Answer at 22. The Lins allege that despite disguising the
assignment as a "land banker" transaction, the assignment was a
general assignment of Toll's rights under the contract, and that

² Neither party precisely defines what it means for Regent to
serve as a "land banker" for Toll, but a precise definition is not
required in order for the Court to rule on the motion.

1 Toll contends it no longer remains liable for performance of its
2 obligations under the contract. Id. at 22-23. Accepting as true
3 for purposes of this motion the Lins' allegation that Regent did
4 not serve as a land banker for Toll, then Toll was required to
5 obtain the Lins' prior written consent. See Agreement § 18.7.
6 Since there are issues of fact as to whether Regent served as a
7 land banker for Toll and whether Toll obtained the Lins' prior
8 written consent to the assignment, the Court denies Toll's Motion
9 with respect to the Lins' fourth counter-claim.

10
11 **C. Intentional and Negligent Misrepresentation Counter-**
12 **Claims**

13 Toll seeks judgment on the pleadings on the Lins' fifth and
14 sixth counter-claims, arguing that Toll's alleged
15 misrepresentations cannot serve as a predicate for fraud and
16 negligent misrepresentation claims. Mot. at 12. The Lins allege
17 that at the time of the assignment to Regent, Toll did not intend
18 to remain liable for the performance of its obligations under the
19 Agreement. Answer at 24. The Lins allege that Toll
20 misrepresented that Regent would serve as a mere passive land
21 banker, that Toll rather than Regent would continue to develop the
22 property, and that the Lins relied on these misrepresentations to
23 their detriment. Id. at 21-25.

24 Toll argues that even if true, such misrepresentations cannot
25 serve as the basis for fraud and negligent misrepresentation
26 claims. Mot. at 12. Toll relies on Hunter v. Up-Right, Inc., 6
27 Cal. 4th 1174 (1993). In this wrongful termination case, an

1 employer misrepresented that the employee's position was being
2 eliminated in order to induce the employee to resign. Id. at
3 1179. The jury found a breach of the implied contract not to
4 terminate employment without good cause, breach of the implied
5 covenant of good faith and fair dealing, and fraud. Id. at 1180.
6 On appeal, the California Supreme Court held that a
7 misrepresentation aimed at termination of employment does not give
8 rise to an independent fraud claim. Id. at 1185. The California
9 Supreme Court found the misrepresentation was merely the means to
10 the end of the wrongful termination. Id.

11 The present case is distinguishable. With regard to the
12 assignment to Regent for Sub-Area 2, the Lins allege that Toll
13 misrepresented that Regent would merely serve as a passive land
14 banker. Unlike the facts of Hunter, this alleged
15 misrepresentation was not the means to a breach of contract
16 because the Agreement allows the buyer to assign all or any
17 portion of its interest in the Agreement so long as the buyer
18 obtains the seller's prior written consent. See Agreement § 18.7.
19 Accepting as true for purposes of this motion the Lins' allegation
20 that Toll misrepresented Regent's status in order to induce the
21 Lins to permit the assignment, the Lins' counter-claims for
22 intentional and negligent misrepresentation should not be
23 dismissed. The Court denies Toll's Motion with respect to the
24 Lins' fifth and sixth counter-claims.

25
26 **V. CONCLUSION**

27 For the reasons stated above, the Court DENIES Plaintiff and
28

Counter-Defendant Toll Brothers, Inc.'s Motion for Judgment on the Pleadings.

IT IS SO ORDERED.

Dated: January 14, 2009



UNITED STATES DISTRICT JUDGE